Supreme Court of the United States

OCTOBER TERM, 1904.

No. 244.

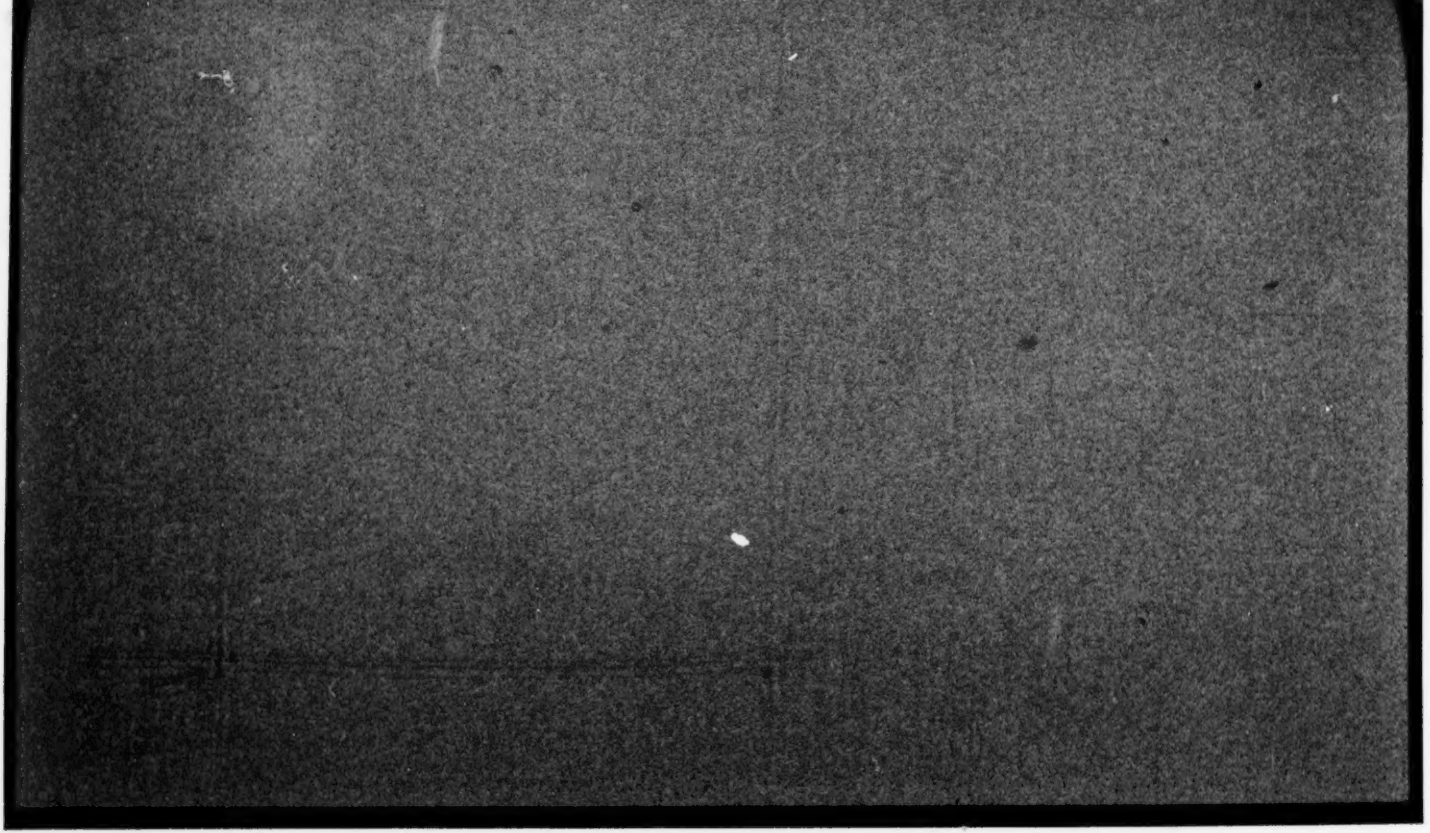
GUS S. COURTER, Auditor, et al., - - - - Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

SUPPLEMENTAL BRIEF FOR APPELLEE.



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GUS. G. COULTER, AUDITOR, *et al.* - - - *Appellants*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Supplemental Brief for Appellants.

STATEMENT.

During the oral argument appellee's counsel stated they desired to file a further response to our original brief and an affidavit to show the local taxes in dispute due certain counties and municipalities amounted to more than $2,000, exclusive of interest and costs.

Upon our suggestion that we might wish to reply to any additional brief filed for appellee, the court stated we should have that privilege. To the filing of such an affidavit, as indicated, we announced to the court our objection. After the close of the oral argument and the submission of the case, we learned for the first time appellee's counsel had filed with the clerk an affidavit of the purport mentioned, as well as an additional response to our original brief, and we received copies of the same from the clerk. Concerning the matters contained therein we submit the following suggestions and points:

I

THE AFFIDAVIT FILED FOR APPELLEE.

1. The affidavit of Thomas B. Harrison, Jr., one of the attorneys of the appellee, undertakes in this court, after the final decree of the Circuit Court and the appeal therefrom to this court, to supply what appellants' counsel claim to be a fatal defect in appellee's bill, to which appellants demurred for want of jurisdiction. The manifest error committed by the court below in overruling this demurrer can not be cured in this way. The allegations of the bill, or the state of the record with respect to the amount in dispute when the demurrer was passed on, must control. If a bill can be thus amended in effect by affidavit in a vital particular after a final decree, and an appeal to this court, there would be no need of any pleadings whatever in the court below. But there is no precedent in this court, or any State court of last resort for such an unusual practice, and we presume none will be set for it in this case.

2. This affidavit, however, emphasizes the correctness of our contention in the court below and in this court, that there was no equity in the bill because appellee had not paid, or tendered and offered to pay the local taxes due upon so much of the assessment of appellee's franchise as is conceded by appellee to be correct. Appellee by its bill conceded the counties and other subdivisions of the State were entitled to local taxes on an assessment of its franchise for 1902 at not exceeding $4,017,154.66. The affidavit filed shows the exact amounts due each county under its tax levy for that year on $6,757,745.14, the alleged excess in the assessment of appellee's franchise. If appellee could thus accurately ascertain the amount of taxes coming to each county on said sum, it could as easily have ascertained and paid before the submission of this action in the court below the exact amounts due the several counties named in said affidavit on $4,017,154.66, the portion of its franchise assessment conceded to be correct, just as it did to the State. Certainly it could have done so prior to November 18, 1902, when its amended bill was tendered and filed, and before the final submission for an injunction. Indeed, as a matter of law and fact, all the county tax rates or levies had been fixed prior to the filing of the original bill on July 2, 1902, for that year.

In the appendix to this brief will be found certain sections of the Kentucky Statutes showing when county taxes are to be levied, as well as when they are due and to be collected by the sheriff of the county.

3. Furthermore, it appears by this affidavit that there is but one county, viz., Muhlenberg, to which the amount on the contested part of the franchise assessment for 1902 exceeds $2,000. (Affidavit, p. 5.) So, if the bill be not sustainable as to the State's taxes and shall be treated as a bill against the several counties, municipalities, and taxing districts, so far as the local taxes are involved, a want of jurisdiction with respect to all the counties is shown by this affidavit, except as against the county of Muhlenberg.

II.

ERRORS IN APPELLEE'S RESPONSE TO APPELLANTS' ORIGINAL BRIEF.

1. Appellee's counsel, in their response (pp. 1-2), assert that the total values of property in 1897 and 1898, to wit: $549,419,980 and $552,957,768, respectively, referred to by us in our original brief (p. 50), and by Ex-Auditor Stone in Exhibit E, with his affidavit made in 1898, are the *equalized* values of real estate and personal property subject to equalization, and that the value of property *not* subject to equalization is *excluded* therefrom, while in the total value of property in 1902, to wit: $598,829,633, as stated by us, the value of property *not* subject to equalization is *included*, and that there was a *decrease* instead of an *increase* in 1902, in the total values of property assessable by local assessors, as compared with the values of such property in 1897 and 1898. This claim is without foundation. We have given correctly the total values of all property assessed by the county assessors, after equalization had, including what was, as well as what was not, subject to equalization by the State board, in each of these three years. The affidavit of Ex-Auditor Stone (R. 778) explicitly states that the original reports of the Board of Equalization for 1897 and 1898 were on file in his office, and that "the totals of *taxable* property by counties for said years, as set out on attached sheet (Exhibit E), are taken from said reports." He then gives the total amounts of the *taxable* property for each of said years, which necessarily *includes* the value of the personal property *not* subject to equalization by the State board, as well as the value of real estate and personal property that is subject to equalization by said board.

It is true the caption of said Exhibit E (R. 779) is as follows:

"Totals by counties of the *equalized* value of *taxable*

property in the State of Kentucky for the years 1897 and 1898, and on which taxes were collected for said years."

But this language is not intended to exclude the value of the personalty *not* subject to equalization, but to embrace *all taxable* property in the State on which taxes were collected in the years mentioned. This is confirmed by the fact that in every instance where the official reports of said board appear in this record, the value of the personal property *not* subject to equalization is *included* in the total value of all the *taxable* property in the State under a caption substantially as follows:

"Grand total equalized value of real and personal property."

To illustrate, in the report for 1891 (R. 667), the "grand total *equalized* value of real estate and personal property" is made up of these three items, to wit:

"Total *equalized* value of land and personal property subject to equalization.....	$331,315,155
Total *equalized* value of town lots.....	155,090,161
Total *assessed* value of personal property *not subject* to equalization.....	55,941,616
Grand total *equalized* value of real and personal property.....	$542,346,932"

The same is true in other reports, to wit: For 1896 (R. 599), for 1901 (R. 765), and for 1902 (R. 465).

The assertion of appellee's counsel that there was a *decrease* instead of an *increase* in the total value of taxable property in the State from 1897 and 1898 to 1902 is, therefore, incorrect and misleading. We gave the facts on this point in our original brief, showing an increase of 9 per cent., or 49 millions, in 1902 over 1897, and of 8 per cent., or 45 millions, over 1898.

2. It is further insisted by appellee's counsel in their response (p. 2) that the total value of taxable property would not have dropped from $570,926,762 in 1896 to $549,419,980 in 1897, showing a decrease of $21,506,728; but that is just what did occur, and it is explained in the affidavit of Ex-Auditor Norman, given in October, 1898, as follows (R. 606):

"The period from the 15th of September, 1895, to September 15th, 1896, *was one of very great and unusual depression of all values in the State*, and especially was that true of *real estate*, it being very difficult to sell real estate during that period except at a sacrifice and much below its real value."

When it is borne in mind that the assessments for 1896 were made as of September 15, 1895, *before* such great and

unusual depression in values began, and those for 1897 were made as of September 15, 1896, or *after* such depression had continued for a year, the court will have no difficulty in seeing the cause of the considerable falling off in total values commented on by appellee's counsel.

In *Louisville Trust Co. vs. Stone, Auditor, 107 Fed. 308*, Judge Day, on this point, said:

"It may be that the *depression in values for the years 1897 and 1898* would make the *fair value* for those years not far from 70 per cent. of the value of previous years."

3. Appellee's counsel claim that they have in this case supplied the lack of evidence commented on by the court in *Louisville Trust Co. vs. Stone, Auditor, supra*, and have introduced the oral testimony of some of the witnesses who went before the Board of Equalization and testified in 1902. But on an examination of the affidavits of these witnesses it will be found this claim is unfounded. Instead of these affidavits disclosing what the affiants testified to as witnesses before said board, they refrain from stating what their testimony was with respect to the value of the property assessed by the local assessors in their respective counties. As samples of these affidavits that of Geo. A. Cubbage is given in the transcript (R., 586), it being stipulated between counsel that the statements in the affidavits of 41 other witnesses were the same as in that of said Cubbage. (Clause 1, part 2, stipulation, R. 827-28.) It will be noticed by the court that Cubbage does not state what his own testimony was as to whether or not the property in his county was assessed or equalized at its fair cash value, nor does he state what the testimony of any other witness was on that subject. Indeed, he seemingly avoids doing so, for he doubtless knows, as did each of the 41 others, that he had testified before the said board the property in his own county had been assessed at its fair cash value. These affidavits were, therefore, worthless, and did not supply the defect in the Louisville Trust Company case.

The affidavit of Cooper (which is substantially the same as Cubbage's), and the joint affidavit of Roberts and Arnold, (R. 586-88), only serve to show that the board aimed to bring the assessments up to, at least, 80 per cent. of the *transfer* values, which they, in good faith, estimated to be approximately the fair *cash* value. Neither of these three witnesses inform the court whether or not they testified the property in their respective counties had been assessed at its fair cash value. The *sworn testimony* of the witnesses who went before the Board of Equalization is not given in these affidavits. We adhere to the statement to that effect made in our original brief. (P. 52.) They went before the board for the purpose of proving the property in their respective counties had been

assessed at its fair cash value, and it is not reasonable to suppose they testified otherwise. There is no evidence in these affidavits that said board adopted any rule to equalize the assessments on the basis of 80 per cent. of the *cash* value of the property assessed. (Our original brief, pp. 38-39.)

4. The net earnings of the appellee for the year ending June 30, 1901, which formed the basis for the capitalization the Board of Valuation and Assessment was entitled to use in reaching the total value of appellee's property, according to its fiftieth annual report, amounted to $9,789,174.40. (R. 533.) That board did not, therefore, include in net earnings $800,000 more than it should, as claimed in appellee's response; for Coulter placed the same at only $9,278,289 (R. 489), or over $500,000 less than what such earnings really were, while Hager and Hill, by averaging the net earnings for four years (a course never pursued before), reduced the same over $2,000,000, in making the assessment complained of. (R. 490.)

5. It is insisted by appellee's counsel that the auditor should be enjoined from having instituted a suit to recover the balance of State taxes in the name of the Commonwealth, as required by Section 4104, Kentucky Statutes, because if a judgment was rendered against appellee, it would have to pay or supersede the same, and in the event of an affirmance it would be compelled to pay 10 per cent. damages thereon by reason of the supersedeas. This is certainly a novel ground for the intervention of a court of equity, especially where the injunction sought is to all intents and purposes against the State. Besides, the results feared would not necessarily follow. Appellee before judgment could pay the amount sued for into court or to the court's receiver to abide the final termination of the action, and should judgment be rendered in favor of the State, the appellee need not supersede at all, but pay the amount thereof, and in case such judgment should be, on appeal or writ of error, finally reversed, the Commonwealth, having come into court and submitted itself, as any other litigant, to its jurisdiction would be required to restore the amount paid to it under the judgment thus held to be erroneous. After thus paying the balance of State taxes into court on the judgment in such a suit, appellee could not be required by civil action or indictment to pay the penalty or interest fixed by the statute. Be this as it may, the Circuit Court in this case had no jurisdiction of this action, which is nominally against appellants, but really against the State.

III.

REPLY TO CERTAIN CONTENTIONS OF APPELLEE'S COUNSEL.

1. On page 59 of their original brief counsel for appellee state they "employed the assistant secretary of the board to go through every transfer as shown by the transfer sheets and ascertain the number of instances in which property had been sold on time, where the notes bore *no* interest, with the result that out of thousands of *such sales there* were only *two* instances in which that occurred." This assertion was repeated by appellee's counsel in oral argument, in order to have the court understand that the county clerks in making up these transfer sheets always stated whether the notes given for lands and town lots sold on time, bore interest or not, when the truth is they did *not* as a rule certify that fact, one way or the other. The theory of appellee's counsel on this point was to break down, if possible, the testimony of the members of the Board of Equalization that the consideration recited in the transfers, when the property was sold on long time, could not be accepted as the fair *cash* value, because in many of such cases the transfer notes for deferred payments did *not* bear any interest, and to obtain the present worth, or cash value, a percentage was taken off the face of such recited consideration. The testimony of assistant secretary Thorne on this point was as follows (R. 113-114):

Examined by Mr. Helm:

Q. Did you also examine to see how many, if any, sales there were in which upon the transfer sheets it was *shown* that the notes bore *no* interest?

A. Yes, sir.

Q. How many instances did you find of that kind, if any?

A. Two only.

Q. Out of the total number of sales made, as shown by the transfer sheets which were considered by the board, do I understand you correctly to say that there were only two sales in which the transfer sheets *showed* the notes bore *no* interest?

A. Yes, sir; only two instances.

Cross-examined by Mr. Stone:

Q. You have stated that you remember of two instances where the clerk certified on the transfer sheet that the notes did not bear interest?

Yes, sir.

Q. How many instances did you find where he did not say anything about it, *whether the notes bore interest or not?*

A. I could not state that; I did not count them.

Q. Is it not a fact that *nearly all of them* are in that condition?

A. Yes, sir; most of them are without anything.

Q. Then you could not tell from the transfer sheets made out by the clerks and furnished to the Board of Equalization whether the notes mentioned in them, where they were time sales, bore interest or not?

A. No, sir; only where such is stated.

Q. Well, you have spoken of two instances where it was stated they did *not* bear interest.

A. Yes, sir.

Q. How many instances did you find where the clerk certified they *did* bear interest?

A. I could not tell the exact number.

Q. Were they not *very few* in comparison to the whole number?

A. Yes, sir.

Q. Now, the designations you found on these transfer sheets were usually in this form: "C. & N." for cash and notes, or "notes," or "on time," were they not?

A. Yes, sir; cash, or notes, or on time.

Q. Without giving the number of payments?

A. Yes, sir.

Q. And how many years would they usually run?

A. Sometimes *one to six and seven years.*"

2. Appellee's theory of this case, which the court below appears to have followed, is that the *transfer* value of farm lands and town lots, no matter whether the prices or recited considerations therein were fictitious or real, or paid down, or on long time without interest, or merely estimated in an exchange of lands, must be in all cases considered and treated as the fair *cash* value of the farm lands or town lots transferred, and all assessments, after equalization had, that fall below that standard are to be condemned as intentionally or fraudulently made. It must be remembered that the farm lands or town lots transferred within twelve months prior to assessment day in each county constitute but a small part of the entire quantity of farm lands and town lots in the same county. The theory of appellee's counsel that farm lands and town lots were assessed below their fair *cash* value and *equalized* uniformly in all the counties of the State at 80 per cent. of their fair *cash* value, even, for the sake of the argument, conceding the *transfer* value to be the equivalent of such *cash* value, is completely exploded by a careful analysis of the exhibits prepared by Thorne under the direc-

tion of appellee's counsel. We submit the result of our examination of these exhibits as follows:

FARM LANDS—THORNE'S TABLE A. (R. 141-179.)

The per cent. which the average *assessed* value per acre, plus the per cent. added by the Board of Equalization, is of the average *transfer* value per acre of the *same farm lands* for 1902, as shown by the deeds or the certificates of transfers:

COUNTIES	Per Cent. Assessment Bears to Transfer Value		Per Cent. Added by B. of E.		Total Per Cent. Assessment, After Equalization, Bears to Transfer Value
Anderson	84	Plus	2	Equal to	86
Barren	90	"	4	"	94
Boone	81	"	2	"	83
Boyle	--		--		93
Calloway	--		--		90
Carroll	81	"	8	"	89
Casey	90	"	2	"	92
Clay	--		--		86
Clinton	--		--		116
Edmonson	--		--		94
Elliott	--		--		83
Fayette	--	--	--		87
Fleming	83	"	2	"	85
Garrard	94	"	3	"	97
Hancock	81	"	4	"	85
Harrison	82	"	2	"	84
Henderson	91	"	3	"	94
Jackson	--		--		83
Jefferson	--		--		81
Johnson	83	"	5	"	88
Knott	--		--		90
Knox	--		--		88
Laurel	--		--		86
Lawrence	--		--		86
Leslie	114	"	15	"	129
Letcher	--		--		113
Logan	86	"	6	"	92
Madison	--		--		81
Monroe	84	"	10	"	94
Muhlenberg	85	"	3	"	88
Oldham	90	"	3	"	93
Owsley	--		--		100
Pike	--		--		85
Scott	100	"	4	"	104
Spencer	82	"	2	"	84
Trigg	87	"	2	"	89
Trimble	95	"	2	"	97
Webster	92	"	10	"	102
Woodford	--		--		92

This statement shows the *same farm lands* conveyed by the transfers, certified as having been made within the preceding twelve months in the foregoing 39 counties, were assessed, after equalization had, at *above* 80 per cent., or all the way from 81 to 129 per cent., of the values recited in said transfers, and that in 6 of said counties, the equalized values were 100 per cent. or over of the transfer values.

TOWN LOTS—THORNE'S TABLE B. (R. 180–217.)

The per cent. which the equalized value is of the transfer value of the *same town lots*, as shown by the deeds or certificates of transfers:

COUNTIES	Per Cent. Assessed Value is of Transfer Value
Anderson	86
Ballard	90
Boone	83
Boyle	100
Breckinridge	89
Galloway	92
Carter	88
Clark	82
Clinton	88
Cumberland	83
Daviess	81
Edmonson	94
Estill	88
Fayette	87
Franklin	83
Harrison	83
Hart	83
Henderson	83
Jackson	108
Kenton	84
Lawrence	92
Lee	104
Leslie	96
Letcher	99
Lewis	100
Lincoln	84
Marshall	85
Martin	98
McCracken	83
Menifee	120
Monroe	111
Morgan	149
Oldham	81
Perry	86

COUNTIES	Per Cent. Assessed Value is of Transfer Value
Pike	94
Pulaski	87
Robertson	82
Rockcastle	90
Rowan	86
Russell	102
Scott	100
Todd	81
Trigg	87
Trimble	104
Warren	82
Wolfe	99
Woodford	82

This statement shows the assessed values were *above* 80 per cent., or from 81 to 149 per cent., of the transfer values of the *same town lots* conveyed by the transfers in the preceding year in 48 counties, and that in 10 counties the assessed values were 100 per cent. or more of such transfer values.

FARM LANDS—THORNE'S TABLE C. (R. 218–241.)

The per cent. which the *assessed* value is of the *transfer* value of the *same farm lands*, as shown by the deeds or certified transfers:

COUNTIES	Per Cent. Assessed Value is of Transfer Value
Boone	81
Boyle	91
Calloway	93
Casey	90
Clinton	110
Edmonson	91
Elliott	92
Estill	88
Fleming	81
Franklin	81
Garrard	92
Harrison	84
Jackson	90
Johnson	89
Knott	101
Laurel	85
Lawrence	87
Leslie	111
Letcher	106
Magoffin	83
Marshall	93
Martin	96
Menifee	90

COUNTIES	Per Cent. Assessed Value is of Transfer Value
Oldham	90
Owsley	98
Perry	84
Rockcastle	86
Scott	100
Trigg	87
Trimble	100
Warren	81
Whitley	81
Woodford	92

This statement shows that the *assessed* value was *above* 80 per cent. or from 81 to 111 per cent. of the *transfer* value of the *same farm lands* for 1902 in 34 counties, and that in 6 of these counties such per cent. was 100 or over.

If the farm lands and town lots sold and transferred in the large number of counties named in the foregoing statements were assessed and equalized at a greater per cent. than 80 per cent. of their *transfer* value (which appellee erroneously terms their *cash* value), it is fair and reasonable to assume, in the absence of direct and positive proof to the contrary, that the farm lands and town lots remaining unsold and untransferred in such counties, were assessed and equalized at a like per cent. above 80 per cent. of their value, or at what was considered their fair *cash* value. Indeed, we do not have to rely upon such an assumption, for that fact is clearly and overwhelmingly proven by the county-assessors and members of the Board of Equalization, whose affidavits and depositions were taken by appellants.

We respectfully submit that the decree appealed from should be reversed, with direction to the court below to dismiss the bill as asked in our original brief.

NAPOLEON B. HAYS,
Attorney General,

WILLIAM O. DAVIS,
HENRY L. STONE,
Counsel for Appellants.

APPENDIX.

The following sections of the Kentucky Statutes (Edition of 1903) have been referred to either by counsel for appellants or appellee, or bear upon questions discussed by them in their briefs or oral arguments:

"Section 113. DUTY TO ATTEND TO LITIGATION IN BEHALF OF COMMONWEALTH. He (the Attorney General) shall attend, in behalf of the Commonwealth, to all cases and proceedings in which she may be interested, except where it is made the duty of the Commonwealth's or county attorney to represent the Commonwealth, and shall institute the proper procedure to coerce payment of all demands of the Commonwealth, payable at the treasury, not discharged in proper time."

"Section 114. TO AID AUDITOR IN COLLECTING DEMANDS—AUDITOR TO EMPLOY ASSISTANTS—FEES. He, with the assistance of the Auditor of Public Accounts, shall investigate the condition of all unsatisfied claims, demands and judgments in favor of the Commonwealth, and take all necessary steps by motion, action or otherwise to collect, or cause the same to be collected and paid into the treasury; and to this end the auditor of Public Accounts may employ such assistance and attorneys in the various counties as may be necessary to aid the Attorney General in such investigation or collection. The fees of such assistance as he may have shall be fixed and agreed upon by the Auditor and Governor, be paid out of the State treasury, and shall in no case exceed thirty per cent. of the amount recovered and paid into the treasury, and, provided the thirty per cent. shall not amount to three thousand dollars and more, the fees shall be limited to three thousand dollars; and no fee shall, in any case, be allowed or paid out of the amount recovered and paid into the treasury, unless that portion belonging to the Commonwealth is remitted by the Governor. (Section as amended by act March 29, 1902.)"

"Section 1838. REGULAR AND SPECIAL TERMS. The fiscal court shall be a court of record, and shall hold two regular terms in each year, commencing on the first Tuesday of April and October, and continue until the business of the court is disposed of. But the County Court of any county

may, by an order of record, fix a different date for the commencement of said terms: PROVIDED, That one of said terms shall be held in October." * * *

"Section 1882. FISCAL COURT MAY LEVY TAXES FOR CERTAIN PURPOSES—AMOUNT OF EACH TAX. That the court of claims or levy, or Fiscal Court, of each county in this Commonwealth is hereby authorized to levy and collect a poll and *ad valorem* tax to pay off the existing current indebtedness, and to defray the current and necessary expenses of the respective counties of the Commonwealth of Kentucky. But this act shall not be construed so as to authorize the Court of Claims or Fiscal Court of any county to levy a tax to pay any railroad bonded indebtedness, or any interest on any such indebtedness. That the poll tax shall not exceed one dollar and fifty cents on each male person of the age of twenty-one years or more residing in the county. The *ad valorem* tax shall not exceed fifty cents on the one hundred dollars' worth of taxable property assessed in the county."

"Section 1883. BASIS FOR LEVY AND COLLECTION OF TAX. That the assessment made for State purposes, when supervised as required by law, shall be the basis for the levy and collection of the *ad valorem* tax authorized in the preceding section, and the officer who may collect the State revenue in each county shall also collect the aforesaid poll and *ad valorem* taxes."

"Section 1885. WHEN TAXES ARE DUE—PENALTY FOR NON-PAYMENT. Said taxes shall be due at such times as the State revenue is, and anyone owing same who shall fail or refuse to pay the same when due, shall be subject to the same penalties prescribed by law for the non-payment of the State revenue, to be enforced by the same proceedings."

"Section 4143. TAXES, WHEN DUE—REPORTS AND PAYMENTS TO AUDITOR—PENALTIES. All State, county and district taxes, except as otherwise specially provided, shall be due and payable on and after the first day of March after the assessment." * * *

"Section 4147. REPORTS BY SHERIFF TO COUNTY COURT—PENALTY FOR FAILURE TO COLLECT TAX OR REPORT

—PAYMENT OF CLAIMS. The sheriff or collector of the State and county revenue of each county of this Commonwealth shall, on the first day of May, June, July, August, September, October, November and December in each year, report under oath, to the County Court of his county, the amount of State and county taxes he has collected, together with all fines, forfeitures or money, or any other account that shall have been received or collected by him, showing in said report the amount collected for and belonging to each particular fund, for which such revenue or money may be intended."

"Section 4081. INTERSTATE CARRIER — TELEPHONE AND TELEGRAPH—FRANCHISE, HOW FIXED—LIABLE FOR LOCAL TAXATION. If the corporation organized under the laws of this State or of some other State government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of the State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines *operated, owned, leased or controlled* in this State, bears to the total length of the lines *owned, leased or controlled* in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through, or into which, such lines pass or are *operated*, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State."

"Section 4104. TAXES — PENALTIES AND INTEREST — RECOVERY OF. Taxes, penalties and interest due the Commonwealth from any *railroad company* may be recovered by the Auditor of Public Accounts, by *action* in the name of the Commonwealth, in the Franklin Circuit Court; and those due any county, city, incorporated town or taxing district may be recovered by the officer authorized to receive the same, by *action* in the name of the Commonwealth in any court of competent jurisdiction."